FILED
OCT 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

PETITIONER'S BRIEF IN REPLY TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondent's brief in opposition (Opp.) contends that the Washington Supreme Court did not render a decision on the merits of petitioner's takings claim. Respondent is incorrect. The Washington court rendered a final decision with regard to two significant areas of federal constitutional takings law.

I

THE "RELEVANT PARCEL" ISSUE IN AND OF ITSELF PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

A. The "Relevant Parcel" Issue Was Finally Decided by the Washington Supreme Court

Petitioner, Presbytery of Seattle (Presbytery), claims that at least one-third of its property, the area within the boundary of Hylebos Wetland No. 18, has been taken because that portion of its property must forever remain undeveloped for the benefit of the public. Petition for Writ of Certiorari (Pet.) at 5. The court below recognized that this is the Presbytery's claim against respondent, King County (County). Appendix to Petition for Writ of Certiorari (Pet. App.) at A-4 ("It is Presbytery's argument that the ordinance prohibits the development of a substantial portion of its property and thereby effects a taking of property without just compensation.") Indeed, Presbytery relied considerably upon *Allingham v. City of Seattle*, 109 Wash. 2d 947, 749 P.2d 160, 163 (Wash. 1988), where the very same Washington Supreme Court only two years prior ruled that regulations which effect only a portion of a larger parcel can result in a taking.

The Washington court therefore stated the first issue as follows:

> "ISSUE ONE. Does a land use regulation which prohibits development of a portion of an undivided parcel of property constitute a 'taking' of the portion which must remain undeveloped?" Pet. App. at A-5.

In framing this issue, the Washington court interpreted the local ordinance as prohibiting development within the wetlands portion of Presbytery's property. This interpretation of local law is also supported by the record.[1] The result is that regardless of what development might be allowed for other nonwetlands portions of the property, the court recognized that under the regulation the wetlands area "must remain undeveloped."[2]

Nevertheless, the Washington court rejected Presbytery's takings claim. The court concluded that the relevant unit of property to be considered in Fifth Amendment takings claims is the entire legal parcel considered as a whole.

The very nature of this Court's prior takings analyses precludes the application of such hard and fast rules. This is particularly true where a regulation impacts land use so harshly as to require that the land in question remain undeveloped. Indeed, this Court has recognized that the "parcel as a whole" discussion found in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), is inadequate to meet the definitional

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[1] The affidavit of Bryan Glynn, Manager of King County Building and Land Development Division, submitted by the County (Appendix to Opp. at 13), makes clear that although development may be allowed for uplands portions of Presbytery's property that are adjacent to the Hylebos wetland, any plan (such as the plan suggested by Mr. Thorpe) to build within the wetland boundaries would be rejected. Appendix to Opp. at 18 (Paragraph 10 of affidavit).

[2] *See also* Pet. App. at A-21, where the court below recognized that approximately one-third "of the owner's land will have to remain 'open space' to protect the Hylebos wetland."

issues that might arise in other cases. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987).[3] The petition and supporting amici briefs fully set forth the reasons why this unsettled issue, which broadly impacts property owners, should be reviewed by this Court. *See* Pet. at 18-22; brief amicus curiae of American College of Real Estate Lawyers at 11-14; brief amicus curiae of the American Farm Bureau Federation at 12-13; brief amicus curiae of Oregonians in Action at 5-7.

The Washington Supreme Court's ruling rejected Presbytery's claim that a portion of its property was taken. That rejection constitutes a final judgment by the state's highest court on the merits of a federal claim. Jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).[4]

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[3] Unlike the present case, this Court in *Penn Central* found there was no absolute prohibition of construction in the airspace above the old Grand Central Terminal, and that right of use was not abrogated for the further reason that the owners were provided transferable development rights. *Penn Central*, 438 U.S. at 137. The present case provides this Court with the opportunity to refine the *Penn Central* "parcel as a whole" analysis for cases involving regulation of portions of a larger parcel where the regulation operates as severely as does the one here. In doing so, the Court could consider the applicability of Chief Justice Rehnquist's view in *Keystone* that when a regulation "extinguishes the whole bundle of rights in an identifiable segment of property," the effect on the property owner "is indistinguishable from the effect of a physical taking." *Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting).

[4] It should also be noted how the County has confused the "final decision" requirement of takings law with (continued)

B. Ripeness Considerations Are Not a Barrier to the Court's Review of This Issue

Only after rejecting the takings claim as to one-third of the Presbytery's property, did the court below consider whether a takings claim was ripe with respect to the parcel as a whole. And it was only with respect to the parcel as a whole that the court below concluded there was no final decision regarding what development might be allowed on the property.

Significantly, the court's discussion and holding regarding exhaustion and futility with respect to the parcel as a whole has no bearing whatsoever on the finality of the regulation's impact on the one-third of the property that "must remain undeveloped."

II

THE WASHINGTON SUPREME COURT FOUND IT NECESSARY TO AND DID RESOLVE OTHER REGULATORY TAKINGS ISSUES ARISING UNDER THE UNITED STATES CONSTITUTION

Apparently the County is uncomfortable with the broad and radical pronouncements made by the Washington Supreme Court regarding federal constitutional takings law, including the court's novel adoption of

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the final judgment requirement of Section 1257. *See* Opp. at 12. Regardless of the County's confusion, this case presents both a final decision concerning the impact of the regulation on the one-third portion of Presbytery's property, as well as a final judgment of the Washington Supreme Court.

a "threshold test" and its characterization of takings challenges as due process violations not requiring compensation. The County's brief in opposition suggests that these pronouncements are mere "dicta" (Opp. at 8), and that "[t]o the extent the court engaged in any discussion arguably contrary to federal law, it played no role in the court's decision." Opp. at 7.

But the Washington court did not take such a limited view of its opinion. The court stated:

> "The issues presented in this case are interrelated and cannot be analyzed as separate and distinct inquiries. It is impossible to analyze the exhaustion doctrine and its futility exception without first having a clear understanding of the tests to be utilized for regulatory takings and substantive due process violations. . . . Any case which considers the futility exception to the exhaustion requirement must view it in context of the constitutional definition of a regulatory 'taking'. Therefore, this opinion commences with a consideration of recent state and federal case law regarding constitutional limitations on land use regulations." Pet. App. at A-6.

What followed was the Washington court's bold pronouncement of its new threshold inquiry which screens out most regulatory takings claims and converts those challenges into due process claims which the court found to be noncompensable. *See* Pet. at 8-18; Pet. App. at A-8, 9. The petition and supporting amici briefs fully develop the import of this radical approach to the Fifth Amendment. Significantly, by the Washington court's own terms, these pronouncements were not dicta, but were intended to establish federal constitutional law for the State of Washington.

Under these circumstances, this Court has recognized that the federal question is properly before it. Where the state's highest court assumes that a federal constitutional issue is properly before it and proceeds to consider and rule on that issue, this Court has jurisdiction to review the matter. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Whitney v. California*, 274 U.S. 357, 360-61 (1927); *see generally* R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice at 158 (6th ed. 1986). Accordingly, the Washington Supreme Court's conclusion that the resolution of regulatory takings standards was a prerequisite to any application of the exhaustion doctrine, and that court's subsequent ruling thereon, demonstrates without question that the federal constitutional issues raised and decided are properly before this Court.

CONCLUSION

All development of one-third of the Presbytery's property has been prohibited. The purpose of this prohibition is far different from that involved in cases where noxious uses of property have external effects. Instead, all use is prevented in order to foster a public desire to keep the property in its present state. This is justified by perceived ecological benefits to the public in general.

Presbytery submits that where government seeks to achieve a public benefit by precluding all use of property, the practical effect is no different than where government simply condemns the property for that purpose. And the legal effect is also no different. Regardless of whether a condemnation or a prohibition of use applies to an entire

parcel, one-third of the parcel, or some other quantity of private land, the effect on the property owner is the same. As Justice Brennan observed in his dissent in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 652 (1981):

> "From the property owner's point of view, it may matter little whether his land is condemned or flooded, *or whether it is restricted by regulation to use in its natural state*, if the effect in both cases is to deprive him of all beneficial use of it." (Brennan, J., dissenting; emphasis added.)

The Washington court has concluded that regardless of the harshness of the regulation, one must always look to the larger parcel as the unit of property to be considered in a takings analysis. In addition, the Washington court has determined that regardless of how a regulation impacts the usability of one's property, whether in whole or in part, if the regulation satisfies Washington's "threshold test," no compensable taking is even possible. This result follows even though the regulation may be viewed as "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The net effect of the Washington Supreme Court's decision is to substitute a rigid and inflexible formula for determining whether a taking has occurred. This approach is totally inconsistent with the more analytical and equitable standards found by this Court to be appropriate in evaluating Fifth Amendment takings claims, as reflected by the language quoted above from *Armstrong*, and as further amplified in cases such as *Penn Central*,

438 U.S. at 123-25, and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

Since the court below ruled on substantial federal questions in a manner inconsistent with federal law, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: October, 1990

Respectfully submitted,

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